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No. 83-1986

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD HAJMOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient use of the United States mails and sufficient evidence of petitioner's participation in a scheme to defraud to support his convictions for mail fraud under 18 U.S.C. 1341.

2. Whether the district court properly required petitioner to announce at the close of the government's case whether he intended to rely on an entrapment defense based on the government's evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A100) is reported at 725 F.2d 1561. The findings of fact, conclusions of law, and verdict of the district court (Pet. App. A101-A197) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A198-A200) was entered on March 5, 1984. A petition for rehearing was denied on April 6, 1984 (Pet. App. A201-A203). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted on four counts of mail fraud and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C.

371 and 1341, and two counts of extortion and one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951. He was sentenced to a total of three years' imprisonment, two years' probation, and a $20,000 fine. The court of appeals affirmed the convictions with the exception of one of the substantive extortion counts (Pet. App. A1-A100).[1]

As summarized by the court of appeals (Pet. App. A4-A17), the evidence at trial established that petitioner, a Florida attorney, along with co-defendants Dan Scarborough, a Florida state senator, and George L. Onett, an attorney and lobbyist, engaged in a scheme to obtain a Florida liquor license for Peter Abbott, a person they knew was not qualified to receive such a license because of a prior felony conviction. In late 1979, Abbott sought petitioner's assistance in locating and purchasing a restaurant in Jacksonville, Florida. Although he needed a Small Business Administration loan in order to purchase the restaurant he had chosen, Abbott told petitioner that he would be unable to qualify because he had been adjudicated a bankrupt and had been convicted of vehicular homicide (Pet. App. A6; Tr. 2023). Petitioner responded that there would be no problem, and he prepared a contract for Abbott to purchase the restaurant (Tr. 2023, 2026). In petitioner's presence, Abbott signed the instrument as purchaser and furnished a $3,000 down payment (Pet. App. A27, A140; Tr. 2030).

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[1]Petitioner's co-defendant Dan Scarborough was convicted on both conspiracy counts and both extortion counts. He was sentenced to a total of two years' imprisonment, three years' probation, and a $15,000 fine. The court of appeals affirmed, except with respect to one of the substantive extortion counts. Co-defendant George L. Onett was convicted on both conspiracy counts, one extortion count, one mail-fraud count, and two perjury counts, in violation of 18 U.S.C. 1623. He was sentenced to six months' imprisonment followed by four and one-half years' probation, and a fine of $22,500. His convictions were affirmed. Co-defendant Louis H. Ritter, Sr. was acquitted by the district court on all charges against him. Citations to the transcript and exhibits are based upon those contained in the government's brief in the court of appeals.

Following approval of the loan, petitioner and Abbott discussed obtaining a liquor license for the restaurant venture. When Abbott reminded petitioner of his felony conviction, petitioner responded that he would put everything in the name of Abbott's wife, Jean (Tr. 2069). In December 1979, petitioner prepared articles of incorporation showing that Jean Abbott was the sole owner of the restaurant corporation as well as its president, vice-president, secretary, treasurer and sole director. In petitioner's presence, Abbott forged his wife's signature on the document and backdated it from January 1980 to December 1979 (Pet. App. A7, A28-A29).

On December 11, 1979, petitioner accompanied Jean Abbott to the state Beverage Department office in Jacksonville, where she filled out a personal questionnaire and furnished her fingerprints. During a subsequent visit to obtain a temporary liquor license and the permanent transfer of the license to Abbott's restaurant, she filed documents reflecting that she was the sole officer of the corporation and the only person connected with the business. At that time, the officer in charge of the Beverage Department told petitioner that all correspondence and applications would be mailed from the Jacksonville office to the Tallahassee office for further processing.[2] After Peter Abbott falsely told a Department investigator that he and his wife were divorced, petitioner advised him to state instead that they were separated because the fact of divorce could be verified. Pet. App. A8-A9.

A temporary liquor license was issued in March 1980. Petitioner subsequently told a Beverage Department investigator that Peter Abbott had no interest in the restaurant,

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[2]Mailings from the Jacksonville office to the Tallahassee office were charged in the mail-fraud counts on which petitioner was convicted.

and he later prepared and submitted affidavits executed by the Abbotts to the same effect (Tr. 2134-2135). Subsequently, petitioner also told a Department supervisor that Peter Abbott had no interest in the venture. He later explained to his secretary that, because Abbott was a convicted felon, it was necessary to keep his interest secret. Pet. App. A9-A11.

On April 22, 1980, the Beverage Department denied the license-transfer application. Petitioner subsequently enlisted the assistance of Senator Scarborough in obtaining the liquor license. At Scarborough's suggestion, petitioner also sought the help of Scarborough's friend Onett, who wanted $25,000 for his services but ultimately agreed to settle for $15,000. Peter Abbott authorized petitioner to hire Onett (Tr. 4166). Pet. App. A12-A14. On May 7, 1980, in a recorded conversation,[3] petitioner admitted submitting false statements on the license application and asked Scarborough to exert his influence over the Chief of the Beverage Department to procure the license (GX 27T, at 6, 19; Pet. App. A123). The following day, petitioner filed an amended liquor license application, which adopted a suggestion by Onett (GX 27T, at 29) that Abbott be identified as having an " 'outside interest as accommodation endorser and guarantor without recourse to the corporation.' " Petitioner subsequently told Abbott not to tell his wife that he was " 'paying off' " for the liquor license (Pet. App. A15).

On May 24, 1980, Abbott was videotaped placing $7,500 in an envelope and handing it to petitioner, who was to deliver it to Onett (GX 30, 30T). The scheme to obtain the liquor license terminated in August 1980 when Abbott's restaurant closed and the Beverage Department finally

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[3]On April 11, Abbott had advised an FBI agent of his activities with petitioner; the agent instructed him to continue to follow petitioner's instructions (Tr. 2011). Prior to that time Abbott had acted with criminal intent (Tr. 2151).

rejected the application. Pet. App. A16-A17. A subsequent search of petitioner's law office revealed a personal financial statement of Abbott's showing that he was president and general manager of the restaurant (*id.* at A28).

ARGUMENT

1. a. Petitioner contends (Pet. 9-14) that the mail-fraud statute does not extend to the foreseeable use of the United States mails to transmit documents between state governmental offices in the course of a scheme to defraud. This claim is plainly without merit.

This Court explained long ago, in addressing a predecessor to 18 U.S.C. 1341, that:

> [t]he overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. * * * Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy * * *.

Badders v. *United States*, 240 U.S. 391, 393 (1916). The purpose of the statute is to prevent the federal mails from being used to effectuate fraudulent schemes. *Durland* v. *United States*, 161 U.S. 306, 314 (1896). Accordingly, even where a scheme independently violates state law, it will be within the federal mail-fraud statute when the mails have been used in the course of the scheme. *Parr* v. *United States*, 363 U.S. 370, 389 (1960).

It is therefore not surprising that the courts of appeals have consistently upheld the application of the statute to schemes such as the one here involving the integrity of state and local governments and officials. See, *e.g.*, *United States* v. *Goldstein*, 695 F.2d 1228, 1233 n.7 (10th Cir. 1981), cert. denied, 462 U.S. 1132 (1983) (fraudulent submissions to state medicaid agency); *United States* v. *Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980) (collusive

bidding on city contracts); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir.), convictions aff'd per curiam, 602 F.2d 653 (1979) (en banc), cert. denied, 445 U.S. 961 (1980) (involvement of governor and others in fraudulent concealment of identities of owners of race track); *United States* v. *Castor*, 558 F.2d 379 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978) (fraudulent applications for liquor licenses; mailings were letters from state alcoholic beverage commission to applicants); *United States* v. *Bush*, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976) (fraud by city employee); *United States* v. *Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976) (fraud by city alderman); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974) (submission of false voter-registration affidavits to city election commission). Petitioner does not cite a single case to the contrary.[4] In view of the unambiguous statutory language and its consistent interpretation in this respect by the courts, petitioner's argument should be directed to Congress, not to this Court.

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[4]Petitioner's reliance (Pet. 12) on *Rewis* v. *United States*, 401 U.S. 808 (1971), is misplaced. In *Rewis*, the Court interpreted an ambiguous statute, the Travel Act (18 U.S.C. 1952), not to criminalize gambling operations merely because they were patronized by out-of-state bettors. The Court adverted to the issue of "sensitive federal-state relationships," but relied for its decision simply on congressional intent and the rule of lenity (401 U.S. at 812). By contrast, it is beyond question that Congress intended the mail-fraud statute to reach all fraudulent schemes facilitated by use of the federal mails (see, *e.g.*, *Durland* v. *United States*, *supra*), and petitioner's scheme clearly falls within the plain language of Section 1341.

Petitioner's suggestion (Pet. 11) that there is something especially intrusive about this prosecution because the mailings were between state governmental offices is meritless: petitioner was charged with causing these mailings as part of his fraudulent scheme. This neither encroached on the powers of the state nor intruded into the manner in which the state conducts its business. Petitioner's argument (Pet. 13) that federal jurisdiction was a matter of "happenstance" ignores the fact

b. Petitioner also argues (Pet. 25-29) that there is insufficient evidence of his participation in a scheme to defraud because he was merely innocently providing legal services to the Abbotts. This claim is wholly lacking in substance and is advanced in total disregard of the factual findings made below.

Petitioner was not, as his argument suggests, indicted for incorporating Abbott's restaurant. Rather, he was charged with participating in a scheme to defraud Florida citizens of their rights to Senator Scarborough's honest and disinterested services and to have Beverage Department officials act on the basis of truthful information, and to obtain a liquor license on the basis of false pretenses (see Pet. App. A21-A22; Appellee's C.A. Br. 75-76).[5] The district court found that "Peter Abbott owned and operated Abbott's Restaurant as the owner-in-fact of the corporation * * * [and] was actively engaged in the management and operation of the restaurant" (Pet. App. A135); that petitioner "knew of these facts at all times material to the allegations of the indictment" (*ibid.*); that petitioner "misrepresented to the Beverage Department * * * that Peter

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that he was advised that application materials would be mailed from one office to another (see page 3, *supra*). His claim (Pet. 14) that, had the mails not been used, the statute would not have been violated merely states the obvious. Cf. *McElroy* v. *United States*, 455 U.S. 642, 658-659 n.22 (1982). We note that petitioner was acquitted on two counts of mail fraud based on letters he sent from his office to the Beverage Department because the government was unable to prove beyond a reasonable doubt that the letters had been mailed rather than delivered by hand (see Appellee's C.A. Br. 78 n.66).

[5]Petitioner's suggestion (Pet. 13) that the federal courts would not be able to determine whether the relevant state statute was violated is belied by the plain language of the law, which refers to the identities of any " 'persons interested directly or indirectly with the applicant in the business' " (Pet. App. A24 n.8). Petitioner does not appear to argue that this statute did not require disclosure of Peter Abbott's interest in the restaurant.

Abbott had no interest, direct or indirect, in the ownership of Abbott's Restaurant" (*id.* at A136); that petitioner "believed that Peter Abbott had a felony conviction" (*id.* at A141); that petitioner "misrepresented and concealed the amounts and sources of monies invested in Abbott's Restaurant" (*id.* at A143); and that petitioner's own "testimony, if believed, would conflict with the testimony of at least ten other witnesses" (*id.* at A148). The court of appeals upheld these findings of the district court (*id.* at A26-A35), agreeing that petitioner "misrepresented to the Beverage Department that Peter Abbott had no interest, direct or indirect, in the ownership of the restaurant" (*id.* at A27) and that petitioner "not only misrepresented Peter Abbott's ownership, he also tried to conceal it" (*id.* at A30).

The courts below properly concluded that petitioner was an active participant in the fraudulent scheme and not a deluded attorney innocently acting within the scope of his professional obligations. See Model Code of Professional Responsibility DR 7-102(A) (1981) ("In his representation of a client, a lawyer shall not * * * (3) Conceal or knowingly fail to disclose that which he is required by law to reveal * * * [or] (5) Knowingly make a false statement of law or facts."). Petitioner's contention to the contrary is simply an attempt to reargue the facts, which does not merit review by this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

2. Petitioner also contends (Pet. 15-24) that the district court erred in requiring him to declare at the close of the government's case-in-chief whether he intended to present an entrapment defense. This claim is frivolous on the facts of this case.

Prior to trial, the government moved to require petitioner and his co-defendants to furnish notice whether they would rely on an entrapment defense. The day before the government rested it renewed the motion, explaining that it needed

to know whether the defense would argue entrapment on the basis of the government's own evidence so that it could present evidence of predisposition before resting (Tr. 3418-3419). The defendants objected on procedural grounds, claiming that the court lacked authority under local rules to require such disclosure (Tr. 3420-3421). The court, however, required them to disclose the information the following day (Tr. 3420). The next day, the government again insisted that the defendants give notice whether they intended to present an entrapment defense based on the government's evidence, explaining that it was not seeking to force them to elect whether to present entrapment evidence in their own case (Tr. 3518). When the defendants stated that they would not present such a defense, the government rested (Tr. 3519). See Pet. App. A50-A54.

Petitioner's contention (Pet. 17) that the court's ruling improperly required him to elect whether to admit the acts charged by relying on an entrapment defense or to waive the defense simply is not presented on these facts. First, petitioner never raised this argument in the district court. Second, the ruling did not require such an election, but only an announcement whether he would present an entrapment defense relying solely on the government's evidence; it was clear that petitioner would still be free to raise the defense based on his own evidence.[6] Third, nothing in the court's ruling suggests that petitioner could not have claimed entrapment based on the government's evidence without admitting his participation in the crime.[7]

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[6]Petitioner's unsupported claim to the contrary (Pet. 22) is simply wrong.

[7]This case therefore does not present the question argued by petitioner (Pet. 18-21) whether a defendant may constitutionally be required to make such an admission in order to raise an entrapment defense on the basis of his own evidence. Petitioner's claim (Pet. 21-22) that the rule permitting an entrapment defense based on the government's evidence without admitting the acts charged was fashioned for

What petitioner actually seems to be asserting (see Pet. 22-24) is the right to capitalize on a procedural trick whereby he could raise the defense of entrapment while foreclosing the government's right to adduce relevant evidence regarding the validity of the defense; this he is surely not entitled to do. Cf. *United States* v. *Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981), cert. denied, 457 U.S. 1107 (1982); *United States* v. *Mack*, 643 F.2d 1119, 1121 (5th Cir. 1981). And to the extent petitioner merely relies upon some claimed loophole in the local district court rules, such an assertion, rejected by both the district court and the court of appeals, plainly merits no further review.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

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the first time by the court of appeals in this case is erroneous. At least two earlier Fifth Circuit cases, which are binding precedent within the Eleventh Circuit (*Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc)), had announced the rule. See *United States* v. *Greenfield*, 554 F.2d 179, 182 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978); *Sears* v. *United States*, 343 F.2d 139, 143-144 (5th Cir. 1965).

[8]In any event, petitioner never did raise an entrapment defense, and no predisposition evidence was offered by the government to rebut one. The defense would of course have been futile in view of the fact that the fraudulent scheme was well under way before Abbott contacted the authorities. See pages 2-4 & note 3, *supra*.

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